

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 13508 of 2010

AFR

Maria Kadaisma @ Kadaiska @ ... *Petitioner*
Salmina

-versus-

State of Odisha and Others *....* *Opposite Parties*

Advocates appeared in this case:

For Petitioner : Mr. Prasanta Kumar Jena, Advocate

For Opposite Parties : Mr. Ishwar Mohanty
Addl. Standing Counsel

Mr. P.K. Parhi, Deputy Solicitor General
Mr. B.S. Rayaguru, CGC

CORAM:
THE CHIEF JUSTICE
JUSTICE M.S. RAMAN

JUDGMENT
15.03.2023

Dr. S. Muralidhar, CJ.

1. Aggrieved by the custodial death of her husband, a woman belonging to the Kandha tribe, a particularly vulnerable tribal group in Rayagada district in Odisha, has approached this Court seeking justice.

2. The incident is stated to have happened on 3rd June, 2010 when the dead body of Pidera Kadaiska, the husband of Petitioner was handed over to the Sarpanch Subash Majhi and Geroqe Kadaiska of village Gerengaguda in Rayagada district where the burial took

place. The background facts are that the family of the Petitioner are under the Below Poverty Line (BPL) earning livelihood collecting firewood from forest. It is stated that about a fortnight prior to his death, the Petitioner's husband had gone to Kerala in search of employment and worked in different places in breaking stones and chips.

3. On returning to the village, the Petitioner's husband, accompanied by another tribal person Mandha Majhi of the nearby village of Sarikima, went in search of firewood carrying a country made 'desi gun' which is used to hunt birds, Rabbit and other small animals as was the usual practice of the tribal in the remote forest areas. It appears that when Pidera Kadaiska, the Petitioner's husband, and Mandha Majhi, were in the forest, the Central Reserve Police Force (CRPF) personnel led by Bhanu Shankar Yadav (Opposite Party No.5) of the CRPF Camp at Rayagada were coming from Gudari towards Chandrapur in course of 'naxal' combing operations. Both Pidera and Mandha were caught by them and brought to the Chandrapur Police Station (PS) (Camp). They are stated to have been mercilessly beaten there by the CRPF personnel with the butts of the guns, lathis and kicks.

4. After four days Mandha Majhi was let off as he possessed a valid licence for his *desi* gun. However, Pidera was not. The CRPF did not care to inform his family members or relatives nor was his detention recorded in any book, log, memo or anywhere. On 3rd June, 2010 the Sarpanch of Chandrapur, Subash Majhi,

was sent a message by the Inspector-in-Charge (IIC) to come to Chandrapur P.S. urgently. Accompanied by George Kadaiska, a relative of the victim, Subash Majhi went by a bike up to Muniguda from where the IIC, Chandrapur P.S. arranged a jeep for them to be taken to the SP at Rayagada. There the Additional SP informed them at around 11 am of the death of Pidera Kadaiska. The post mortem of the body was conducted in Rayagada itself and the Addl. SP insisted that Subash and George should bury the dead body of the deceased in Rayagada itself and not take the dead body to the village. However, upon insistence of Subash and George, the Addl. SP finally handed over the dead body to them. They then brought Pidera's body to the village for burial as per the traditions of the Tribal-Christian community.

5. Reliance is placed by the Petitioner on a fact-finding report of the People's Union for Civil Liberties (PUCL) which was prepared after speaking to the victim's family members, the villagers, the local Sarpanch Subash, Mandha Majhi and the local media persons at Rayagada. The fact-finding team recorded in their report released on 19th June, 2010 that on the allegation that he was 'maoist', Pidera was caught by the CRPF Jawans on 1st June and brought to Rayagada on 2nd June, 2010. After he complained of stomach ache, he was taken to the hospital where he was received as dead. The PUCL team noted how the SP, Rayagada informed them that between 1st and 2nd June, 2010 Pidera was made to walk about 40 kilometers and that he might have died out of sheer exhaustion. The IIC, Rayagada is stated to have informed the team, on the basis of the post-mortem report,

that both sides of the heart were empty, black colour deposits were found in the lungs, the genitals were swollen and there was a mark of wound (6-7 days) old and 5cm x 2 cm in size on his buttock. At that stage, the immediate cause of death was kept reserved pending receipt of the histo-pathological test report of the viscera. The team was informed that a Magisterial inquiry had been conducted by the Rayagada Tahasildar and a report had been sent to the National Human Rights Commission (NHRC).

6. Pursuant to the notice issued in the present petition on 15th September, 2010 a counter affidavit has been filed by the DSP, Rayagada Sri Prakash Chandra Jena on 22nd September, 2010. It is stated *inter alia* therein that to curb extensive naxalite activities, two Special Operation Group (SOG) teams were deputed to carry out combing operations in Chandrapur and Gudari PS forest areas. During the combing operation near Tagapankal forest area under Chandrapur P.S. limits, some persons were found moving in a suspicious manner on the night of 1st June, 2010. The SOG party chased them in the jungle and were able to apprehend one person who was found armed with a country-made revolver with four rounds of live ammunition. He disclosed his identity as Pidera Kadaiska. On personal search, the operation party is stated to have recovered from Pidera a black haversack containing H.F. wireless set, two maoist banners, two bundles of wire, two detonators and two land mines. The other persons who accompanied him are stated to have escaped from the jungle. During interaction, Pidera is supposed to have confessed to being part of a maoist group which had planted land mines.

7. The SOG party is stated to have returned at 4.30 pm on 2nd June, 2010 to the Headquarters at Rayagada along with the arrested detained persons. The written complainant of OP No.5 was forwarded to the Rayagada PS and Rayagada PS Case No.109 of 2010 was registered under Section 121/121A IPC read with Sections 25 and 27 of the Arms Act and Section 3 and 4 of the ES Act/Section 17 of the Criminal Amendment Act.

8. Pidera is stated to have complained of 'chest pain and uneasiness' at 5 pm and was immediately shifted to the District Headquarter Hospital (DHH), Rayagada by an ambulance where he was declared by the MO as brought dead at 5.20 pm on 2nd June, 2010. An U.D. Case No.10 of 2010 was stated to have registered and was being enquired into by the IIC, Rayagada PS even as of the date of filing of the counter affidavit. An inquest was supposed to have been conducted in the presence of witnesses and the Sarpanch of Chandrapur GP and videographed as per NHRC guidelines. The final report of the doctors conducting the post-mortem (PM) is stated to have been received. After examining the visceral examination report of the F.S.L. Rasulgarh and of the Professor and Head of the Department of Pathology, the M.K.C.G. Medical, Berhampur, the doctors conducting the PM opined that Pidera Kadeska 'died of sudden cardiac arrest', a natural cause of death.

9. In the counter affidavit there is a denial that the Petitioner's husband was brutally tortured and killed while in custody. It is

alleged that the deceased-husband of the Petitioner was actively associated with the CPI (Maoist) and involved in the criminal activities with 'top maoist cadres' and had conspired with them to blast the Government properties as well as other vital installations. It is denied that there was any SOG operation on 23rd May, 2010 or that the Petitioner's husband was detained and brutally beaten on that date. It is maintained that he was apprehended on the night of 1st June, 2010 and brought to Rayagada in the afternoon of 2nd June, 2010.

10. Enclosed with the counter affidavit is a copy of the FIR registered against the Petitioner's husband. The report submitted on 2nd June, 2010 by the IIC, Rayagada PS of the combing operation undertaken, the property seizure memo, the inquest report, the PM report, the report of Tahasildar, Rayagada of Magistrial enquiry have also been enclosed.

11. A separate affidavit has been filed by the Deputy Collector (OP No.2) denying that any compensation is payable and contending that such claim was 'misconceived'. It is stated that Rs.5,000/- had been paid on 3rd June, 2010 to the next of kin of the deceased out of the Red Cross Fund towards funeral expenses. It is claimed that there is no provision to provide appointment to a member of the family of the deceased.

12. In the rejoinder affidavit filed, the Petitioner stated that after her husband was brutally tortured and killed on 2nd June, 2010 in custody, she and her five minor children are in starvation. In the

rejoinder affidavit, attention is drawn to the injury marks on the glottal region of the deceased as indicated in the PM report. It is pointed out how the PM report notes “abdomen and face scrotum and penis were swollen. Blisters were present in different parts of the body.” Further it is also mentioned in column 7(C) of the P.M. report the remarks noted are: “passage of stool from Anus was present. Blood-tinged froth from both the nostrils was present. Tongue was protruded.” Under the heading of External Injuries it has been recorded as old heal abrasion over right buttock more than 7 days old of size 5 cm into 2 cm was also found. Under ‘internal examination’ it was noted that blood-stained fluids were present in the nasal cavities. Further, under the heading ‘abdomen-genital organ’ it was recorded that “the penis and scrotum were swollen.”

13. As regards the possession of cultivable land, the Petitioner states in the rejoinder that Pidera had another brother and two sisters, who are the legal heirs of his father and his share from the parental property is less than an acre. This was why he was forced to move to Kerala to work as a daily labourer in a crusher unit. It is submitted in the rejoinder that a false narrative has been created in the FIR lodged against the Petitioner’s husband that he belonged to banned CPI (Maoist) organization and that he was involved in criminal activities.

14. It must be noted at the outset that after 27th June, 2011 the case was listed once on 22nd November, 2012 and thereafter listed only on 14th February, 2023. After hearing the submissions of

learned counsel for the Petitioner Mr. Prasanta Kumar Jena and Mr. Ishwar Mohanty, learned Additional Standing Counsel for the OP-State and Mr. P.K. Parhi, learned Deputy Solicitor General along with Mr. B.S. Rayaguru, learned Central Govt. Counsel for the OP No.5 order/judgment was reserved by this Court on the said date.

15. The above narration of facts paints a disturbing scenario. A tribal person, with no means of survival and in search of firewood armed with just country made weapon used for hunting birds and animals, was 'caught' by the CRPF SOG on the presumption that he belonged to the CPI (Maoist) cadre. Except the FIR enclosed with the counter affidavit, and the version of the police, there is nothing which persuades the Court to conclude that there was sufficient material with the Police to infer that the Petitioner's husband belonged to the CPI (Maoist) group or that he was indulging in criminal activities.

16. Be that as it may, the fact remains that even on the showing of the OP No.5 the Petitioner's husband was in their custody from 1st June, 2010 onwards. For detaining a person for alleged criminal activities, the Cr PC provisions applied. This was in the year 2010 by which time the detailed guidelines set down by the Supreme Court in the judgment in ***D.K. Basu v. State of West Bengal (1997) 1 SCC 416*** applied. Nothing is stated in the counter affidavit which would indicate that any of those guidelines were followed. Although there have been numerous instances of custodial deaths which have been dealt with by this Court from

time to time, it is as if those judgments have not persuaded the Police to change their habits.

17. In *Nilabati Behera v. State of Orissa (1993) 2 SCC 746*, the Supreme Court reminded that:

“It is axiomatic that convicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and its is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen o life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the constitution of India cannot be denied to convicts, undertrials or other prisoners in custody, exact according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law.”

18. In *D.K. Basu (supra)*, the Supreme Court posed the following queries:

"Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal court of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'. The precious right guaranteed

by Article 21 of the Constitution of India cannot be denied to convicted undertrials, detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.”

19. The undeniable facts in the present case are that from the time of his arrest on 1st June, 2010 till he is supposed to have died due to ‘natural causes’, the Petitioner’s husband was in the custody of the CRPF and then the police to whom he was handed over. He was brought dead at the DHH Hospital in Rayagada. Therefore, the death must have happened some time between 1st and 2nd June, 2010, during which time he was very much in the custody of first the CRPF and then the police. The burden is on the police to show that he died due to ‘natural causes’. Although the medical report finally submitted by the two doctors appears to support the version of the police, the PM report itself depicts something to the contrary. It reflects that there were injuries on the body of the deceased which required to be satisfactorily explained and which are not consistent with the theory of death due to ‘natural causes’.

20. It is unfortunate that the two medical doctors working with the Government have certified the death to be due to ‘natural causes’ when even to a lay person the PM report indicates the contrary. In this context, the Court would like to refer to the ‘The Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United

Nations General Assembly on 18 December 1982, and particularly Principle 2, which states: “It is a gross contravention of medical ethics... for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment...”.

21. It is not a mere coincidence that the deceased tribal person who was tortured to death while in custody after being labelled a maoist with not even an iota of evidence belonged to the poorer sections of the society. He had no one to represent his interests or to give him legal assistance while in custody. The legal system appears to have completely failed him. The mandatory fundamental rights available to an arrested person as spelt out in in Article 22 (1) and (2) of the Constitution of India were violated with impunity in this case first by the CRPF and then the police. Article 22 (1) to (3) which is relevant for this purpose reads as under:

“22. Protection against arrest and detention in certain cases .— (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no

such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention.”

22. In *D.K. Basu (supra)* where the following detailed guidelines were set out:

“1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock- up, shall be entitled to have one friend or relative or other person know to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the

district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

7. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

8. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

9. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Ilaka Magistrate for his record.

10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

11. A police control room could be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

23. Further, in ***D.K. Basu*** (*supra*) the Supreme Court observed:

"The requirements mentioned above shall be forwarded to the Director General of every State/Union Territory and it shall be their obligation to circulate the same to every police station under their charge and get the same notified at every police station under their charge and get the same notified at every police station at a conspicuous place. It would also be useful and serve larger interest to broadcast the requirements on All India Radio besides being shown on the national Network of Doordarshan any by publishing and distributing pamphlets in the local language containing these requirements for information of the general public. Creating awareness about the rights of the arrestee would in our opinion be a step in the right direction to combat the evil of custodial crime and bring in transparency and accountability. It is hoped and accountability. It is hoped that these requirements would help to curb, if not totally eliminate, the use of a questionable methods during interrogation and investigation leading to custodial commission of crimes."

24. Following the above decision, the Cr.P.C. was amended to formally incorporate into the statute as Sections 41-A to D the guidelines in ***D.K. Basu*** (*supra*) which in any event was binding on all authorities under Article 141 of the Constitution. Sections 41A, 41 B and 41 D of the Cr.P.C. read as under:

“41A. Notice of appearance before police officer.—(1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.

41B. Procedure of arrest and duties of officer making arrest.— Every police officer while making an arrest shall—

(a) bear an accurate, visible and clear identification of his name which will facilitate easy identification;

(b) prepare a memorandum of arrest which shall be— (i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the

arrest is made; (ii) countersigned by the person arrested; and

(c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest.

41D. Right of arrested person to meet an advocate of his choice during interrogation.—

When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation.”

25. There is no manner of doubt that irrespective of the Petitioner’s husband being labelled as a ‘maoist’ by the Opposite Parties, and even if he belonged to a ‘banned’ organisation, his fundamental rights under Article 22 (1) to (3) of the Constitution cannot be said to have been denuded. It is trite that a person is presumed innocent till he is found guilty. The mere suspicion that a person happens to belong to CPI (Maoist) group will not clothe the police with impunity to deal with him in any which way they like.

26. The Delhi High Court in *Nina Ranjan Pillai v. Union of India 2011 (5) AD (Del) 36* held as under:

“The basic minimum right to life and dignity should be available to every prisoner. When that non-derogable minimum standard is breached, the principle of strict liability should be invoked against the jail authorities making them answerable in law for the consequences of such breach.”

27. Again in *Re-Inhuman Conditions in 1382 Prisons (2017) 10 SCC 658*, the Supreme Court observed as under:

"55. Over the last several years, there have been discussions on the rights of victims and one of the rights of victims and one of the rights of a victim of crime is to obtain compensation. Schemes for victim compensation have been framed by almost every State and that is a wholesome development. *But it is important for the Central Government and the State Governments to realize that persons who suffer an unnatural death in a prison are also victims - sometimes of a crime and sometimes of negligence and apathy or both.* There is no reason at all to exclude their next of kin from receiving compensation only because the victim of an unnatural death is a criminal. Human rights are not dependent on the status of a person but are universal in nature. Once the issue is looked at from this perspective, it will be appreciated that merely because a person is accused of a crime or is the perpetrator of a crime and in prison custody, that person could nevertheless be a victim of an unnatural death. Hence the need to compensate the next of kin."

28. In the present case no convincing explanation has been given this Court by the Opposite Parties in support of their stand that the Petitioner's husband while in their custody, died out of 'natural causes'. The PM injuries referred to hereinbefore remained unexplained. The OPs have not been able to discharge the burden of showing that Pidera, the Petitioner's husband who died in their custody, did not die at a result of custodial violence inflict upon him.

29. For the aforementioned reasons, the Court is satisfied that the fundamental rights of the Petitioner's husband under Articles 14, 21 and 22 (1) to (3) of the Constitution have been violated. Consequently, the Opposite Parties are held liable to pay the family of the deceased for such violation of his constitutional rights. As explained in *Nilabati Behera (supra)*:

“...’a claim in public law for compensation’ for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is ‘distinct from, and in addition to, the remedy in private law for damages for the tort’ resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution.”

30. In *Charles Sobraj v. Superintendent, Central Jail, Tihar (1987) 4 SCC 104* the Supreme Court reminded as under:

“If a whole atmosphere of constant fear of violence frequent torture and denial of opportunity to improve oneself is created or if medical facilities and

basic elements of care and comfort necessary to sustain life are refused then also the humane jurisdiction of the court will become operational based on Article 19. ... prisoners retain all rights enjoyed by free citizens except those lost necessarily as an incident of confinement. Moreover, the rights enjoyed by prisoners under Articles 14, 19 and 21, though limited, are not static and will rise to human heights when challenging situations arise."

31. In the present case, it is unfortunate that the qualified medical personnel have by submitting a questionable medical report attempted to help the State authorities in particular CRPF, the law enforcement agency in the present case, and the police in whose custody the Petitioner's husband died, to avoid their liability. The Court would urge the Opposite Parties and whose control and jurisdiction such government doctors have operated to institute a proper inquiry into such conduct and take to its logical conclusion.

32. The Court directs the CRPF and the Odisha State Police in whose service Opposite Party No.5 was at the relevant time to pay compensation of Rs.5,00,000/- (Rupees five Lakh) each (i.e. total of Rs 10 lakhs) to the Petitioner within a period of eight weeks from today, failing which the amount would be payable along with 6% simple interest for the period of delay.

33. A compliance affidavit be filed in this Court within nine weeks failing which the Registry would bring it to the attention of this Court for appropriate directions.

34. The writ petition is disposed of in the above terms. A copy of this judgment be sent to the Director General, CRPF as well as the Addl. Chief Secretary (Home), Government of Odisha forthwith for necessary and compliance.

(S. Muralidhar)
Chief Justice

(M.S. Raman)
Judge

S.K. Jena/Secy.

